

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

EDWARD R. ESTER, dba WARD
APARTMENTS,

Appellant,

v.

PUGET SOUND AIR POLLUTION CONTROL
AGENCY,

Respondent.

PCHB Nos. 87-84 and 87-189

FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

Edward R. Ester, d/b/a/ Ward Apartments appealed to this Board contesting the Puget Sound Air Pollution Control Agency's ("PSAPCA") issuance of Notice and Order of Civil Penalty (No. 6652). The Notice and Order alleges violations of Regulation I, Section 9.08(a) (burning waste-derived fuel) for conduct on December 12, 1986, and assessed a \$1,000 fine. This became our PCHB No. 87-84.

Mr. Ester also appealed PSAPCA's issuance of Notice and Order of Civil Penalty No. 6712. That Notice and Order alleges a violation of

1 Regulation I, Section 9.03(b) and WAC 173-400-040(1) (opacity), for
2 conduct on July 12, 1987, and assessed a \$400 fine. This became our
3 PCHB No. 87-189.

4 The appeals were consolidated for hearing which was held on
5 December 14, 1987, and continued to January 11, 1988, and March 13,
6 1988. Court reporters affiliated with Gene Barker & Associates
7 recorded the proceedings. Appellant Ester was represented by Attorney
8 Michael L. Olver of Merrick & Olver, P.S. Respondent PSAPCA was
9 represented by Attorney Keith D. McGoffin of McGoffin and McGoffin.

10 Witnesses were sworn and testified. Exhibits were admitted and
11 examined; argument was made. The Board members have reviewed the
12 record. From the foregoing, the Board makes these

13 FINDINGS OF FACT
14

15 I

16 Respondent Puget Sound Air Pollution Control Agency ("PSAPCA") is
17 an activated air pollution control authority under terms of the
18 state's Clean Air Act, Chpt. 70.94 RCW, empowered to monitor and
19 enforce regulations on burning waste-derived fuel and on opacity in a
20 five-county area of mid-Puget Sound.

21 The agency has filed with the Board a certified copy of its
22 Regulation I, including all amendments thereto. We take judicial
23 notice of Regulation I (as amended).

24 II

25 At all times relevant to these appeals, Appellant Edward R. Ester

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

PCHB Nos. 87-84 and 87-189

(2)

1 owned an apartment building known as the Ward Apartments, located at
2 105 Ward Street in Seattle, Washington, King County.

3
4 III

5 On December 3, 1986 PSAPCA received a complaint addressed to the
6 U.S. Environmental Protection Agency which alleged, inter alia, that
7 the owner/landlord of the Ward Apartments burned "dirty 'used' oil".
8 Based on that complaint, PSAPCA's engineer sent a letter by certified
9 mail on December 4, 1986 to Mr. Edward Ester informing him that a
10 complaint had been received, and stating that PSAPCA proposed to
11 inspect Ward Apartments, pursuant to RCW 70.94.200 and Regulation I,
12 Section 3.05(a), on December 12, 1986 at 9:00 a.m. to collect
13 samples. The letter further stated that if the date and time were not
14 convenient, the Agency should be contacted to arrange a "mutually
15 acceptable date and time". (R-4) A second letter dated December 9,
16 1986 was sent by certified mail to Mr. Ester reciting that a telephone
17 conversation had been held with him, and confirming the (above)
18 inspection schedule.

19 IV

20 PSAPCA's engineer who worked on this case has been employed by the
21 agency for nine years and is a licensed engineer in the State of
22 Washington. He has a Bachelor's degree in physics, and has taken
23 numerous air pollution courses including ones on sampling and field
24 enforcement. He has also assisted in developing Regulation I, Section
25 9.08, which forms the basis of the alleged violation in PCHB No. 87-84.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

PCHB Nos. 87-84 and 87-189

(3)

V

On December 12, 1986, the engineer arrived at the Ward Apartments and identified himself to the apartment manager. The engineer went to the oil tanks. These underground tanks feed into the Apartment's furnace.

Prior to sampling, the engineer measured the depth of oil in the tanks. The oil samples were then taken primarily above the bottom sludge level. A glass tube was inserted three times into each tank and a total 150 milliliters of oil per tank were placed into clean sample containers. The containers were labeled and a chain of custody prepared.

VI

The samples were split with one set sent to the E.P.A. laboratory in Manchester. PSAPCA also performed tests on the samples in its own laboratory. Regulation I, Section 9.08(c) defines "waste-derived fuel" as fuel exceeding specified limits. The laboratory test summary results showed the following results, with the Regulation I limits shown in the last column:

<u>RESULTS</u>	<u>WARD APARTMENT TANKS</u>			<u>Regulation I</u>
<u>PSAPCA tests</u>				
	<u>A</u>	<u>B</u>	<u>C</u>	<u>Limits</u>
Sulfur (%)	.13	.01	.33	2.00%
Chlorine (ppm)	3900	5034	2851	1000 ppm
<u>(EPA) tests</u>				
Arsenic (ppm)	0.4	4.6	1.4	5 ppm
Cadmium (ppm)	3.9	3.5	3.3	2 ppm
Chromium (ppm)	7.3	28.4	8.7	10 ppm
Lead (ppm)	256	536	237	100 ppm
PCB (ppm)	2	2	2	5 ppm

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

PCHB Nos. 87-84 and 87-189 (4)

VII

On the basis of the inspection Notice of Violation (No. 0022426) dated December 12, 1986 was issued. After the laboratory results were received in April 1987, Notice and Order of Civil Penalty (No. 6652) was issued assessing a \$1,000 fine, from which this appeal (PCHB No. 87-84) was filed.

VIII

We find that oil in the tanks more probably than not exceeded Regulation I, Section 9.08(e) limits for four different chemicals: chlorine, cadmium, chromium and lead. In some instances the levels were more than 5 times the regulatory limits (i.e. Tank B for chlorine and lead). We find that PSAPCA did not authorize the burning of such oil.

IX

Appellant's expert's critique of PSAPCA's sampling was unpersuasive. The expert was neither on-site during the sampling, nor had he been on site and inspected the tanks at any time prior to testifying. His main point was that he believed the samples were not representative of material burned in the furnace. However, some critical information he relied upon, such as the supposed location of the feeder pipe in the tanks, was based on assumptions of fact not in evidence. In sum, we are persuaded that PSAPCA's sampling was proper.

From the season of the year and the physical relationship of the tanks to the furnace, we infer that fuel from the tanks had been

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

PCHB Nos. 87-84 and 87-189

(5)

1 burned in the furnace. Although the oil sampled may have contained
2 some sludge, there is no reliable evidence that such oil-containing
3 sludge was not burned. We further infer, therefore, that the samples
4 properly represented oil that was burned. Such an inference is
5 proper, when the tested material is located in such an area solely
6 under appellant's control. Appellant provided no direct evidence
7 whatsoever to rebut such inference; the only scintilla of evidence
8 presented was dependent upon second-hand information which we were not
9 convinced was reliable.

10 X

11 On July 13, 1987, in response to a citizen's complaint received
12 about 2:00 p.m., a PSAPCA air pollution inspector arrived at the Ward
13 Apartment at approximately 2:15 p.m. The inspector is trained in
14 detecting plume opacity, having been certified by the Department of
15 Ecology as a plume reader 34 times in the past 15 years. His most
16 recent certification relevant to this incident was on October 3, 1986,
17 valid for one year for black smoke and six months for white smoke.

18 The inspector positioned himself 150 feet westerly of the
19 Apartments, and beginning at 2:20 p.m. for six consecutive minutes at
20 15 second intervals read and recorded the smoke coming out of the
21 Apartment's chimney. The readings showed 30% to 40% opacity with the
22 color black.

23
24
25
26 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

27 PCHB Nos. 87-84 and 87-189

(6)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

XII

As a result of the July 13, 1987 inspection, PSAPCA sent appellant Notice of Violation (No. 002304), and thereafter Notice and Order of Civil Penalty (No. 6712) assessing a \$400 fine. Appellant appealed to this Board on August 10, 1987, and the appeal became our PCHB No. 87-189.

XIII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the person and the subject matter of this proceeding. RCW 43.21B.110.

Respondent PSAPCA has the burden of proof in these appeals.

II

Section 9.08(a) prohibits burning waste-derived fuel without prior approval of PSAPCA.

"Waste derived fuel" is defined as:

[. . .] any fuel that is contaminated with dangerous waste or exceeds, in the case of fuels in a liquid state under standard conditions, any of the following limits:

- (i) 0.10 percent ash by weight
 - (ii) 100 parts per million (ppm) by weight of lead;
 - (iii) 5 ppm arsenic by weight;
 - (iv) 2 ppm cadmium by weight;
 - (v) 100 ppm chromium by weight;
 - (vi) 1000 ppm by weight chlorides;
 - (vii) 5 ppm polychlorinated biphenyls (PCB's);
- [. . .]

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

PCHB Nos. 87-84 and 87-189

(7)

1 Regulation I, Section 9.08(e)(1); emphasis added.

2 We conclude that respondent PSAPCA did prove that a violation of
3 Regulation I, Section 9.08(a) occurred on December 12, 1986.

4 III

5 Regulation I, Section 9.03(b) prohibits a person from causing or
6 allowing air emissions darker than 20% density more than 3 minutes in
7 any one hour. Emissions of 30% or greater were seen on July 13, 1987,
8 for 6 out of 6 minutes. WAC 173-400-040(1) prohibits the same,
9 subject to some exceptions not litigated herein. We conclude that a
10 violation of Regulation I, Section 9.03(b) and WAC 173-400-040(1)
11 occurred. As the owner of the apartment, Mr. Ester is liable for
12 emissions from his building.

13 IV

14 RCW 70.94.200 authorizes air pollution inspectors to enter on
15 private property for investigation purposes. PSAPCA's Regulation I,
16 Section 3.05 is based on the statute. PSAPCA's December 12, 1987
17 inspection was announced and known by appellant in advance. It was
18 conducted at a reasonable time and fully complied with the
19 requirements of RCW 70.94.200 and Regulation I, Section 3.05. (It can
20 be observed that PSAPCA's prior announcement of its inspection, one
21 week ahead, had the potential to jeopardize PSAPCA's ability to
22 ultimately sample the tanks without intervening interference with the
23 tanks' contents.) Appellant's non-constitutional claims about the
24 impropriety of the inspection are without merit.

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

PCHB Nos. 87-84 and 87-189

(8)

1 Appellant's claims that the oil tank inspections were
2 unconstitutional are legal issues that this Board does not have the
3 jurisdiction to address. Yakima County Clean Air Authority v. Glascam
4 Builders, 85 Wn.2d 255, 534 P.2d (1975); Bud Vos v. DOE, PCHB No.
5 86-149, (May 8, 1987).

6 V

7 The purpose of civil penalties is to promote compliance with the
8 laws. The violations found herein are significant ones. Under all
9 the facts and circumstances, we are persuaded that the penalties
10 assessed here were appropriate to further the statutory objective.

11 VI

12 Any Finding of Fact deemed to be a Conclusion of Law is hereby
13 adopted as such. From these Conclusions of Law, the Board enters this
14
15
16
17
18
19
20
21
22
23
24
25

ORDER

Notices and Orders of Civil Penalty Nos. 6652 and 6712 issued by PSAPCA to Edward R. Ester, dba Ward Apartments, are AFFIRMED in full, for \$1,000 and \$400 respectively.

SO ORDERED this 22nd day of September, 1988.

POLLUTION CONTROL HEARINGS BOARD

Judith A. Bendor
JUDITH A. BENDOR, Presiding

Wick Dufford
WICK DUFFORD, Chairman

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

PCHB Nos. 87-84 and 87-189

(10)